IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

Metro Passbook, Inc., a Michigan corporation, the true name of which is Metro Passbook Corporation, a Michigan corporation, presently known as Metro Club, Inc., a Michigan corporation, Petitioner,	NO. 77-1796 Court of Appeals No. 76-1831

v.

Metro Passbooks Corporation, a Pennsylvania corporation, the true name of which is Metro Passbook, Incorporated, Richard Natow and Alfred Krawitz,

Respondents.

* * *

PETITION FOR REHEARING OF APPELLANT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * *

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Metro Passbooks Corporation, a Pennsylvania corporation, the true name of which is Metro Passbook, Incorporated, Richard Natow and Alfred Krawitz, Respondents.	

PETITION FOR REHEARING OF APPELLANT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Metro Club, Inc., by and through its attorney, Lawrence W. Rattner, petitions for rehearing of this Honorable Court's denial of petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioner, in its petition for Writ of Certiorari, argued that the decision of the Sixth Circuit Court of Appeals was contrary to federal case authority. The decision, if permitted to stand, would effectively change the state of the law vis-a-vis the respective rights of senior and junior users of a given trademark.

Respondents, in their Answer to the Petition for Writ of Certiorari, referred this court's attention to language by the trial court in its Memorandum Opinion suggesting that the petitioner had, "acquiesced in defendants' use of the 'Metro' name." Respondents argued that the petitioner,

although a senior user of the disputed mark, could not prevail against a knowing junior user for the reason that petitioner had abandoned the disputed trademark and had acquiesced in its use by respondents. Respondents cited E. F. Pritchard v. Consumers Brewing Company, 136 F 2d 512 (CA 6, 1943) in support of their theory.

The Pritchard case, unlike the case at bar, considered the contractual rights of the parties to a disputed mark. It is patently not in point. The dispute in the case at bar arises out of the common law right to a trademark in the absence of any contractual relationship between the parties.

Petitioners argue that to prove abandonment the respondents must show by clear and convincing evidence that

petitioner had ceased to use the "Metro" mark and, further, did not intend to resume its use. See 3 Restatement Torts, §752; McCarthy, Trademarks and Unfair Competition, §§17:3-4; Anno: Trademark or Tradename-Abandonment, 3 ALR2d 1226. Trademarks may, indeed, be lost by abandonment. Abandonment, however, is the concurrence of an intention to abandon and an act or omission by which such intention is carried into effect. Saxlehner v. Eisner & Mendelson Co., 179 US 19; 21 S Ct 7; 45 L Ed 60 (1900). Aside from the incidental reference to acquiescence by the trial court, there is no other reference in the trial court's opinion to facts which would support the defense of abandonment or acquiescence.

Moreover, the trial court made the material finding of fact that both petitioner and respondents knew of petitioner's intention to continue use of the disputed mark. See P. 10, Petition for Writ of Certiorari.

Petitioner's conduct does not suggest that it intended to abandon the trade-marks or acquiesce to their exclusive use by the respondents in the Philadelphia area. This conclusion is supported by the court's express finding of fact notwithstanding its incidental reference to petitioner having, "apparently acquiesced" in respondents' use of the disputed mark. This would seem to be the only serious defense raised by respondents and, petitioner argues, the trial court's findings of fact do not permit application of this

theory. Hegar Products Co. v. Polk Miller Products Corporation, 47 F 2d 966, 18 CCPA 1106 (1931); Polaroid Corp. v. Polarad Electronics Corp., 287 F 2d 492 (CANY, 1961).

CONCLUSION

The decision in the court below, as affirmed by the Sixth Circuit Court of Appeals, is clearly contrary to federal case law. It is therefore respectfully submitted that this court rehear petitioner's Petition for Writ of Certiorari and review the important question posed by the case at bar.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

PURSUANT TO RULE 58

* * *

United States of America)
State of Michigan) SS.
County of Wayne)

Lawrence W. Rattner, counsel for petitioner in the within cause, being duly sworn deposes and saith:

That he is the attorney representing petitioner in the within cause and that he certifies that the within Petition for Rehearing is filed pursuant to Rule 58, Supreme Court Rules, and is presented in good faith and not for delay. Further, counsel certifies that the petition is made on substantial grounds available to petitioner although not previously presented, to-wit: that petitioner has not, in pleadings

filed with this Court, discussed respondents' defense of abandonment.

_____
Lawrence W. Rattner
Attorney for Petitioner

Subscribed and sworn to before me this October 25, 1978

_____
Donna Marie Stockfish
Notary Public, Wayne County, Michigan
My commission expires:
February 3, 1980